No. 87-1883

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANN J. MALONE, PETITIONER

v.

ANTHONY M. FRANK, UNITED STATES POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in dismissing petitioner's lawsuit pursuant to Fed. R. Civ. P. 16(f), based on her counsel's failure to comply with the court's pretrial order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 833 F.2d 128. The opinion of the district court (Pet. App. 16a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1987. A petition for rehearing was denied on January 25, 1988 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on April 25, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner brought this employment discrimination suit against the United States Postal Service and the

Postmaster General pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 1a). Following commencement of trial in November 1984, the district court declared a mistrial because of petitioner's lack of preparation (*id.* at 17a). According to the court, petitioner's counsel "was calling witnesses in a haphazard manner and was conducting a fishing expedition during trial" (*ibid.*). Prior to declaring a mistrial, the court attempted to address the problem by restricting petitioner's presentation of witnesses and evidence (*id.* at 3a-4a).

On December 13, 1984, the district court issued a pretrial order requiring both parties to produce by April 25, 1985 (45 days before trial), a list of witnesses, the questions to be presented to the witnesses, and their anticipated responses (Pet. App. 30a-32a). The order expressly stated that no requests for a continuance would be entertained (*id.* at 32a). On April 23, 1985, petitioner's counsel informed respondents that she would not comply with the order, and on April 26, 1985, she formally objected to it (*id.* at 4a; see *id.* at 19a-20a). At that time, petitioner also requested a continuance and recusal of the district court judge (*id.* at 4a).

On June 10, 1985, the district court granted respondents' motion to dismiss the complaint (with prejudice) pursuant to Fed. R. Civ. P. 16(f) (Pet. App. 16a-27a).[1] The court found "that the flagrant disobedience by [petitioner's] counsel, her bad faith and her repeated failure to comply in any respect with the Court's pretrial order warrants the sanction of dismissal in this case" (*id.* at 22a). The court stressed that petitioner's counsel never sought to communicate with either the court or re-

[1] Rule 16(f) permits a district court to order sanctions, including dismissal, for violation of a pretrial order. See Fed. R. Civ. P. 37(b)(2)(C) (see Pet. 6-9).

spondents concerning the order until two days before the deadline, when she notified respondents, and first notified the court one day after the deadline had passed (*id.* at 22a-23a). The court found that petitioner's proffered excuse—that she lacked the financial means to comply with the order—was not genuine (*id.* at 23a) and that she had exhibited "punitive conduct towards defense counsel in waiting until April 23, 1985, when adverse counsel was in the throes of fully complying with the Court's pretrial order before advising counsel that [petitioner] was not intending to follow the Court's pretrial order" (*id.* at 25a-26a).

2. The court of appeals affirmed (Pet. App. 1a-13a). The court upheld the district court's authority to issue the pretrial order (*id.* at 12a) and, after considering the five factors relevant under its precedent for determining whether dismissal was warranted under the circumstances,[2] also upheld the district court's decision to dismiss the lawsuit. The court found that the "public interest in expeditious resolution of litigation," "the trial court's interest in docket control," and "prejudice[] [to] the Government" all supported dismissal (*id.* at 7a-8a). The court rejected petitioner's claim that lack of financial resources justified her failure to comply with the order and disputed petitioner's claim that the district court had failed properly to consider alternatives to dismissal (*id.* at 8a-9a). Accord-

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[2] As described by the court of appeals (Pet. App. 5a-6a, quoting *Thompson* v. *Housing Auth.*, 782 F.2d 829, 831 (9th Cir.), cert. denied, 479 U.S. 829 (1986)):

> A district court must weigh five factors in determining whether to dismiss a case for failure to comply with a court order: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions."

ing to the court of appeals, dismissal could be upheld absent explicit discussion of alternatives by the district court where, as in this case, petitioner "has purposefully and defiantly violated a court order," the district court has "actually trie[d] alternatives before employing the ultimate sanction of dismissal," and "the [district] court made it clear that no continuances would be accepted" (*id.* at 10a-11a (citations omitted)). Finally, the court of appeals considered the level of petitioner's personal responsibility and held that "in light of the egregious nature of the malfeasance at issue here," the district court did not "abuse[] its discretion in declining to excuse [petitioner] for the faults of her attorney" (*id.* at 13a).

Judge Tang dissented (Pet. App. 14a-15a). He "agree[d] that the consequences of an attorney's faults or defaults may be visited upon the client, when the sanction is for 'deficiencies in the management of litigation,' as in this case," but concluded that the district court had abused its discretion by failing to consider alternative sanctions (*id.* at 14a). According to the dissent, "[t]he declaration of mistrial and the pretrial order were not sanctions but efforts to manage the litigation" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and is consistent with decisions of this Court. Although there is less than perfect accord among the courts of appeals on the proper standard for invoking the sanction of dismissal based on a lawyer's conduct, there is no clear conflict between this decision and the decision of any other court of appeals. Accordingly, further review is not warranted.

1. As this Court squarely held in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962), it is not "unjust" to dismiss a client's "claim because of his counsel's unexcused

conduct." "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent" (*id.* at 633-634). Petitioner is not, moreover, without recourse. Here, as in *Link* v. *Wabash R.R.*, 370 U.S. at 634 n.10, "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." Petitioner may not, however, "visit[] the sins of [her] lawyer upon [respondents]" (*ibid.*).

Nor is there merit to petitioner's assertion (Pet. 20, 32) that the court of appeals' decision squarely conflicts with decisions of other courts of appeals because it upheld the dismissal sanction even though there is "no evidence" in the record to support a finding that petitioner is "responsible for or aware of counsel's failure to comply with court rules." The court of appeals explicitly "acknowledge[d] that the degree of a plaintiff's personal responsibility for malfeasance is relevant to the propriety of dismissal" and concluded "in light of the egregious nature of the malfeasance at issue" that the district court did not abuse its discretion in ordering dismissal (Pet. App. 13a). Earlier in its opinion, the court of appeals singled out petitioner as personally responsible for the sanctions, noting that "[t]he mistrial, pretrial order, and order of dismissal were *all* instituted in response to the lack of preparation on the part of [petitioner] Malone and her counsel" (*id.* at 10a (emphasis in original)).

For that reason, the Ninth Circuit's decision in this case also does not clearly conflict with the Third Circuit's decisions in *Carter* v. *Albert Einstein Medical Ctr.*, 804 F.2d 805, 807-808 (1986), and *Dunbar* v. *Triangle Lumber & Supply Co.*, 816 F.2d 126, 128-129 (1987), where the court suggested that dismissal is appropriate only if there is

evidence "that [the client] knew of her counsel's defaults or otherwise bore some personal responsibility for his professional irresponsibility" (816 F.2d at 129). While we believe those decisions are wrong in that respect and inconsistent with this Court's reasoning in *Link* v. *Wabash R.R.*, it is reasonable to conclude in this case, unlike in those cases, that petitioner, who was present at the first trial where the misconduct commenced, "bore some responsibility for the flagrant actions of her counsel" (816 F.2d at 129).[3]

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[3] To be sure, the Ninth Circuit has not adopted the Third Circuit's supervisory rule (announced in *Dunbar* (816 F.2d at 129)), which requires a trial court to provide notice to the client prior to ordering dismissal as a sanction for attorney misconduct, but no circuit conflict is presented in this case on that account. The primary purpose of the *Dunbar* rule is to allow the party an opportunity to be heard prior to dismissal. That is a matter distinct from the issue raised by the petition here, which is whether dismissal is valid only if the party actively participated in, or was actually aware of, the attorney's misconduct.

The other court of appeals decisions upon which petitioner relies also do not conflict with the court's decision in this case because they generally apply the same legal principles that were applied by the court in this case, and their differing results are largely the product of each court's careful consideration of the particular facts before it. For example, the D.C. Circuit in *Shea* v. *Donohoe Constr. Co.*, 795 F.2d 1071 (1986), which petitioner discusses (Pet. 20-22), did not hold that dismissal is appropriate only if the client is himself personally at fault. The court stated only that it is "reluctant to affirm dismissal *under the punishment or deterrence rationale* unless the client himself is shown to deserve the sanction" (795 F.2d at 1077 (emphasis added)). The court made clear that "[t]here are times when prejudice to another party or to the judicial system leaves no choice but to dismiss an innocent client[]" (*id.* at 1079) and that "[a]s in the case of dismissal based on prejudice to the defendant, a dismissal based on prejudice to the judicial system need not turn on the level of the client's—as opposed to the counsel's—complicity" (*id.* at 1076). In this case, the district court's sanction was not supported solely by a punishment or deterrence rationale. The court of appeals found that prejudice to

Petitioner also underestimates the extent to which a party may be held legally responsible for actions taken by her lawyer on her behalf. As this Court explained in *Link* v. *Wabash R.R.*, 370 U.S. at 634 (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1880)), in "our system of representative litigation," "each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " In a case such as this one, therefore, a party can be "held to be

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the defendant and to the judicial system supported dismissal (Pet. App. 7a-8a).

Petitioner's reliance (Pet. 22-24) on the Fifth Circuit's decision in *Flaksa* v. *Little River Marine Constr. Co.*, 389 F.2d 885, cert. denied, 392 U.S. 928 (1968), is likewise misplaced. The court there did not announce a flat ban against dismissal based on an attorney's misconduct. The court concluded that dismissal was inappropriate in the case only because under "the circumstances of the case" the party "was in no way * * * connected with or responsible for, his [counsel's] dilatory conduct" (389 F.2d at 889). The court, moreover, did not dispute that a "sanction[] may be imposed upon an innocent litigant for derelict conduct of his counsel," but reasoned that dismissal "should be the last resort" (*id.* at 889 n.11). Here, of course, petitioner was not "[un]connect[ed]" to her counsel's misconduct, and, as described in the text below, the district court first attempted less severe sanctions.

The decisions in *Scarborough* v. *Eubanks*, 747 F.2d 871 (3d Cir. 1984); *Dove* v. *Codesco*, 569 F.2d 807 (4th Cir. 1978); *Carter* v. *City of Memphis*, 636 F.2d 159 (6th Cir. 1980), and *In re Russell*, 746 F.2d 1419 (10th Cir. 1984), cited by petitioner (Pet. 25-26 nn.2-5), also do not aid her cause. The courts of appeals in those cases held that the district court had erred in ordering dismissal as a sanction for attorney misconduct, but in none of those cases did a court rule that dismissal was a valid sanction only if the client actively participated in, or was actually aware of, his attorney's misconduct. The courts instead considered, and grounded their decisions on, a variety of factors, including the level of the party's responsibility. See *Scarborough* v. *Eubanks*, 747 F.2d at 878; *Dove* v. *Codesco*, 569 F.2d at 810; *Carter* v. *City of Memphis*, 636 F.2d at 161; *In re Russell*, 746 F.2d at 1420.

bound by [his] counsels' inaction" based on "inferences of conscious acquiescence" (*id.* at 634 n.10).

2. The court of appeals also correctly rejected petitioner's contention (Pet. 34-43) that the district court abused its discretion by ordering dismissal without first explicitly considering alternative, less severe, sanctions. As the court of appeals explained, no explicit discussion of alternatives is necessary where, as in this case, "the district court actually tries alternatives before employing the ultimate sanction of dismissal" (Pet. App. 10a (citations omitted)). Here, "the district court's November 16, 1984, declaration of mistrial and subsequent pretrial order constituted attempts at less drastic alternatives" (*id.* at 10a). In this case, moreover, as the court of appeals further held (*id.* at 10a-11a), explicit consideration was especially unnecessary because the district court warned petitioner in the pretrial order that "[m]otions or petitions for continuances will not be entertained" (*id.* at 32a). In these circumstances, "[a] plaintiff can hardly be surprised by a harsh sanction in response to willful violation of a pretrial order" (*id.* at 11a).

For this reason, petitioner is also mistaken in contending (Pet. 36, 42-43) that the court of appeals' decision conflicts with decisions of other courts of appeals. The courts in *Searock* v. *Stripling*, 736 F.2d 650 (11th Cir. 1984), and *In re MacMeekin*, 722 F.2d 32 (3d Cir. 1983), reversed the district court's dismissal orders, but they did so largely for reasons wholly unrelated to the need for a discussion of alternative sanctions (see *Searock* v. *Stripling*, 736 F.2d at 653-655; *In re MacMeekin*, 722 F.2d at 34-35). And, although the Fifth Circuit in *Batson* v. *Neal Spelce Associates*, 765 F.2d 511 (1985), and *McCloud River R.R.* v. *Sabine River Forest Products, Inc.*, 735 F.2d 879, 883 (1984), reversed dismissal orders because the district court

had not explicitly considered alternative sanctions, in neither of those cases had the district court (as in this case) previously tried to address misconduct by imposing less severe sanctions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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